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No. 02-527

In the Supreme Court of the United States

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

JOE ALLBAUGH, Director, Federal Emergency Management Agency, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE U.S COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, AND MECHANICAL CONTRACTORS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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CONSENT OF PARTIES PURSUANT TO RULE 37.2(a)

Pursuant to Rule 37.2(a), the parties to this action have consented in writing to the submission of this *amici curiae* brief.

THE INTEREST OF THE *AMICI CURIAE*[1]

A. Sheet Metal and Air Conditioning Contractors' National Association

The Sheet Metal and Air Conditioning Contractors' National Association ("SMACNA") is an international trade association representing 4,500 contributing contractor firms who employ more than 100,000 union sheet metal craftsmen. These contractors specialize in work ranging from heating, ventilation and air conditioning; architectural sheet metal; industrial sheet metal; kitchen equipment; manufacturing; testing and balancing; service work; energy management; to siding and decking. SMACNA contractors routinely perform work on job sites covered by project labor agreements ("PLAs"), and have found them useful in bringing projects to completion on time, on budget and without disruption from labor disputes.

[1] No person or entity, other than the *amici curiae*, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

B. National Electrical Contractors Association

Local Chapters of the National Electrical Contractors Association ("NECA") are the bargaining representatives for over 19,000 electrical contracting firms, employing in excess of 250,000 electrical workers. NECA enhances the industry through continuing education, labor relations, and promotional activities. NECA is comprised of 119 Chapters, which engage in collective bargaining with local unions of the International Brotherhood of Electrical Workers. As with SMACNA, many of NECA's members perform work on construction projects covered by PLAs, and they have a strong interest in maintaining the availability of PLAs as a tool on complex construction projects.

C. Mechanical Contractors Association of America

The Mechanical Contractors Association of America ("MCAA"), with over 2,100 member companies in the U.S., is the leading employer trade association in the complex mechanical systems installation and service sectors of the construction industry. MCAA member companies install, service and maintain mechanical, piping, plumbing and refrigeration systems of all types in industrial, commercial, institutional, and residential facilities for both public agency and private sector clients. Members of the MCAA routinely work on projects covered by PLAs, and they have an interest in the continued availability of PLAs on complex projects.

STATEMENT OF THE CASE

This case arises from President George W. Bush's issuance of Executive Order No. 13202 (2001) which prohibits, in all instances, construction managers acting on behalf of a federal entity, or an entity receiving federal funding, from negotiating project labor agreements ("PLAs"), even in instances where the use of a PLA would financially benefit the federal government or the entity receiving federal funding. The wholesale prohibition of PLAs resulting from Executive Order No. 13202 not only hampers the ability of private construction managers to negotiate the most financially and operationally beneficial contract for the federal agency or the recipient of federal funding, but also dramatically decreases the efficiency and cost-effectiveness with which contractors represented by the *amici curiae* can complete large complex construction projects.

A. Benefits of Project Labor Agreements

Owners, both public and private, involved in major construction projects, as well as the construction managers they hire and the contractors who ultimately perform the work, have long recognized PLAs as useful tools in completing projects on time and cost-effectively. This Court identified the often cited benefit of PLAs in its *Boston Harbor* decision, stating, "Kaiser suggested to MWRA that Kaiser be permitted to negotiate an agreement with the Building and Construction Trades Council and affiliated organizations (BCTC) that would assure labor stability over the life of the project." *Building and Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island ("Boston Harbor")*, 507 U.S. 218, 221 (1993). A single PLA operates to cover all of the contractors, unions, and employees involved on the construction

project, with resulting uniformity on important issues, including working hours, overtime, and holidays. PLAs are also advantageous insofar as they contain dispute resolution mechanisms and no-strike clauses that prohibit work stoppages during the entire duration of the PLA. Thus, the use of a PLA on a complex project ensures that the contractors will not face work stoppages due to the expiration of either the collective bargaining agreement between themselves and their respective unions, or the expiration of a labor agreement in a different trade which could lead to a project-wide sympathy strike, lockouts, other work stoppages, and costly delays.

Practical examples illustrate the benefits of PLAs for the contractors represented by the *amici curiae*. Complex construction projects require the services of numerous different trades. Given the number of trades associated with any multi-year project, the expiration of one or more of the contracts remains unavoidable during the term of the project.[2] Without a PLA, the expiration of each contract would mean the possibility of a work stoppage for that trade and a corresponding sympathy strike by the other trades, all of which would result in significant delays for all of the contractors on the project. The existence of a PLA eliminates the inefficiencies associated with the constant threat of, or actual, work stoppages. While working under a standard PLA, each trade is allowed to negotiate its contract in

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[2] *See John T. Callahan & Sons, Inc. v. City of Malden*, 713 N.E.2d 955 (Mass. 1999) (Court upheld PLA where mayor testified that at least twenty-five labor contracts would expire during the course of a school construction project); *Minnesota Chapter of Associated Builders and Contractors, Inc. v. Minnetonka Indep. School District No. 276*, 1999 WL 1261743 (Minn. Ct. App. Dec. 28, 1999) (Court upheld PLA where construction manager notified school district that approximately eighteen of twenty-seven construction trade union contracts would expire during the term of a school construction project).

the event it expires during a project, but the union is not allowed to strike the project covered by the PLA. Upon completion of the negotiations for a new contract, the union and the contractor generally apply the new terms retroactively. Thus, the union employees realize the benefits of the new contract, while the contractor (plus the owner and all other contractors) do not face the risk of a project-wide work stoppage.

A PLA also establishes a uniform dispute resolution system and requires that each trade subject itself to the jurisdiction of a single chosen neutral. Without a PLA, each job would be subject to multiple contracts with multiple trades, each of which could designate a different dispute resolution system. Without a PLA, no effective means exists for resolving competing claims between rival unions seeking the same work assignment. Under a PLA, on the other hand, all contractors from all trades subject themselves to a single dispute resolution system, resulting in an outcome that binds all affected parties.

In addition to the possible major delays that could arise from a project-wide work stoppage, project labor agreements also afford relief from constant inefficiencies that result from nonuniform working hours. Even a one-half hour difference in working hours during the course of a multi-year project can cause considerable delay and expense, which will be born either by the public entity financing the project or by the contractor.

B. Statutory Authority for Project Labor Agreements

Congress, likewise, recognized the benefits of PLAs and the unique aspects of the construction industry when it amended the National Labor Relations Act ("NLRA"), 29 U.S.C. §151 *et seq.*, in 1959 by adding Section 8(e) and (f), which allow construction industry employers to enter into contracts with

unions prior to actually hiring employees. Generally under the NLRA, a group of currently employed workers would seek representation from a union, which, following an affirmative vote, would represent the employees in negotiating a contract with their employer. As this Court has recognized, however, the construction industry demands a different regimen, because of "the short-term nature of the employment which makes posthire collective bargaining difficult, the contractor's need for predictable costs and a steady supply of skilled labor, and a long standing custom of prehire bargaining in the industry." *Boston Harbor*, 507 U.S. at 231. Thus, Congress enacted Section 8(f), which allows a contractor to negotiate with a union for a contract (a prehire agreement) prior to the contractor hiring its employees.

Section 8(e) takes the concept of a prehire agreement one step further, allowing a construction manager hired by the public or private owner to enter into an agreement with all of the contractors or subcontractors on a single job, thereby ensuring uniformity in all important terms of the contracts.[3] Without such an agreement, all union and nonunion contractors would work under their own contract terms or company rules and policies.

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[3] Congress intended to allow project labor agreements pursuant to Section 8(f). The typical PLA is made expressly available to union and non-union contractors on exactly the same terms. A number of courts have rejected claims that PLAs are impermissibly preclusive. *See, e.g., Associated Builders & Contractors, Inc. v. Southern Nevada Water Auth.*, 979 P.2d 224, 230 (Nev. 1999); *New York State Chapter, Inc. v. New York State Thruway Auth.*, 666 N.E.2d 185, 191-92 (N.Y. 1996); *Utility Contractors Ass'n of New England, Inc. v. Massachusetts Dep't of Public Works*, 5 Mass. L. Rptr.17, No. Civ. A. 90-3035, 1996 WL 106983 (Mass. Super. Mar. 12, 1996); *State ex rel. Associated Builders & Contractors v. Jefferson County Bd. of Comm'rs*, 665 N.E.2d 723, 726-27 (Ohio App. 1995); *see also Associated Builders & Contractors, Inc. v. San Francisco Airport Comm'n*, 981 P.2d 499, 506-14 (Cal. 1999).

C. The Effect of Executive Order No. 13202

Despite Congress' unambiguous intent to allow construction managers to use PLAs for the benefit of both public and private owners as well as contractors and employees who work on complex construction projects, President Bush issued Executive Order No. 13202, in an effort to regulate (and unilaterally amend) national labor relations policy. Executive Order No. 13202 will have an immediate negative effect not only on the federal agencies and recipients of federal funding who deem PLAs an efficient tool in complex construction projects, but also the more than 25,000 contractors represented by the *amici curiae*, who rely on the benefits of PLAs when bidding and performing work on complex construction projects.

Executive Order No. 13202 effectively precludes the use of PLAs on all federally funded construction projects.[4] By its terms, Executive Order No. 13202 explicitly prohibits federal agencies or recipients of federal funding (or their private construction managers) from requiring that a contractor bidding on a job submit itself to a PLA as part of the bid. The Executive Order provides, in relevant part:

> Section 1. To the extent permitted by law, any executive agency awarding any construction contract after the date of this order, or obligating funds pursuant to such a contract, shall ensure that neither the awarding Government authority

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[4] According to data by the federal government, state agencies in 2000 received approximately $24.4 billion from the federal government, via the Highway Trust Fund ($23.9 billion) and other funds ($519 million), to use in connection with construction and maintenance of state highways. *See* "Funding for Highways and Disposition of Highway User Revenues, All Units of Government, 2000." http://www.fhwa.dot.gov/ohim/hs00/hf10.htm

nor any construction manager acting on behalf of the Government shall, in its bid specifications, project agreements, or other controlling documents:

(a) Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or other related construction project(s); or

(b) Otherwise discriminate against bidders, offerors, contractors, or subcontractors for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related construction project(s).

* * *

Sec. 3. To the extent permitted by law, any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects, shall ensure that neither the bid specifications, project agreements, nor other controlling documents for construction contracts awarded after the date of this order by recipients of grants or financial assistance or by parties to cooperative agreements, nor those of any construction manager acting on their behalf, shall contain any of the requirements or prohibitions set forth in section 1(a) or (b) of this order.

Thus, by Executive Order No. 13202, the President has effectively prohibited federal agencies, recipients of federal funding, private construction managers, contractors, and unions from exercising the rights granted to them by the National Labor Relations Act upheld by this Court in *Boston Harbor*.

Section 1(c) of Executive Order No. 13202, however, seems to allow a federal agency or federally funded state or local agency to voluntarily enter into a PLA after it receives bids, but before it commences work on a project. But the realities of the construction industry and the public bidding process prevent the construction managers from exercising the illusory liberty granted by Section 1(c). Almost without exception, public bidding laws require that the public entity let the construction contracts directly to the contractors rather than through private construction managers, thereby requiring the public entity seeking to use a PLA to include a PLA requirement in its bid specifications. Thus, by preventing a publicly funded entity from requiring adherence to a PLA in its bid specifications, Executive Order No. 13202 effectively prohibits the use of PLAs in federally funded construction projects, even in those instances where the owner, the construction manager, and the contractors all stand to benefit from their use.

SUMMARY OF ARGUMENT

Executive Order No. 13202 is a regulatory rather than a proprietary act because it is a blanket rule based upon labor concerns rather than incentives embraced by a typical proprietor. As a regulatory act, Executive Order No. 13202 is invalid because it is preempted by the NLRA under both *Garmon* and *Machinists* preemption principles.

ARGUMENT

A. Introduction

An Executive Order that conflicts with the NLRA is invalid, since it is preempted by federal statute. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332-34 (D.C. Cir. 1996). The central question, therefore, is whether Executive Order No. 13202 violates NLRA preemption principles. But in order for there to be preemption, it must be the case that Executive Order No. 13202 constitutes a regulatory act rather than a proprietary one. *Boston Harbor*, 507 U.S. at 227, 229-30.

B. The D.C. Circuit Court's Conclusion That Executive Order No. 13202 Is Proprietary Rather than Regulatory Is Inconsistent With *Boston Harbor*.

The D.C. Circuit's decision ignores the regulator/proprietor dichotomy embraced by this Court in *Boston Harbor*. In *Boston Harbor*, the Court first recognized that both public and private entities could, in effect, "regulate" by exercising their purchasing power in a particular manner. As the Court stated:

> The conceptual distinction between regulator and purchaser exists to a limited extent in the private sphere as well. A private actor, for example, can participate in a boycott of a supplier on the basis of a labor policy concern rather than a profit motive. The private actor under such circumstances would be attempting to "regulate" the suppliers and would not be acting as a typical proprietor . . . . Private actors therefore

> may "regulate" as they please, as long as their conduct does not violate the law.

This Court then recognized the important distinction between a public actor and a private actor, stating:

> When the State acts as a regulator, it performs a role that is characteristically a governmental rather than a private role, boycotts notwithstanding. Moreover, as a regulator of private conduct, the State is more powerful than private parties. These distinctions are far less significant when the State acts as a market participant with no interest in setting policy.

Boston Harbor, 507 U.S. at 229.

In recognizing that both private and public actors can regulate through their participation in the market, this Court did not draw a bright line between employer conduct unrelated to the employer's performance of contractual obligations to the government and employer conduct related to the employer's performance of contractual obligations. Indeed, the example used by this Court of a private actor attempting to "regulate" an employer by boycotting the employer because of its labor policy did not distinguish between whether the labor policy in question related to the performance of the employer's obligations to the purchaser. Thus, the bright-line rule advanced by the government and adopted by the D.C. Circuit does not reflect this Court's *Boston Harbor* opinion. To the extent that this Court adopted any bright line rule, the bright line distinguished between acts motivated by profit (which constitute pure proprietary act) and acts motivated by labor policy or other policy concerns (which constitute regulation).

Moreover, in *Boston Harbor*, this Court considered additional factors when determining that the MWRA's exercise of its purchasing power did not constitute regulation. Specifically, the Court considered the fact that the MWRA acted on the advice of a manager hired to organize performance of the job; that MWRA was attempting to insure an efficient project that would be completed quickly and cost effectively; and that MWRA's actions were "specifically tailored to one particular job, the Boston Harbor cleanup project." *Boston Harbor*, 507 U.S. at 232. The Court concluded that "[t]here is therefore no basis on which to distinguish the incentives at work here from those that operate elsewhere in the construction industry, incentives that this Court has recognized as legitimate." *Id.*, *citing*, *Woelke & Romero Framing Co. v. NLRB*, 456 U.S. 645, 662 (1982).

The D.C. Circuit Court, on the other hand, did not consider the various factors relied upon in *Boston Harbor* when determining that the MWRA's actions constituted non-regulatory market activity. The D.C. Circuit ignored the fact that the President did not rely upon the advice of a manager hired to organize one or more complex projects when issuing Executive Order No. 13202. Further, the D.C. Circuit ignored that the President intended to ensure "Open Competition and Government Neutrality" in the bidding process rather than ensure an efficient project that would be completed as quickly and cost effectively as possible. Finally, the D.C. Circuit failed to consider that the Executive Order was not tailored to one particular job but, instead, applied to literally thousands of federal projects and federally funded projects involving billions of construction dollars.

Executive Order No. 13202, on its face, seeks to do more than simply ensure that which a normal market participant seeks to ensure, namely a reduction in construction costs to the federal

government and to the taxpayers. By its express terms, Executive Order No. 13202 goes much further by seeking to:

1. Promote and ensure open competition on Federal and federally funded or assisted construction projects;
2. Maintain Government neutrality towards Government contractors' labor relations on Federal and federally funded or assisted construction projects;
3. Reduce construction costs to the Federal Government and to the taxpayers;
4. Expand job opportunities, especially for small and disadvantaged businesses; and
5. Prevent discrimination against Government contractors or their employees based upon labor affiliation or lack thereof.

The "typical proprietor" used by this Court as an example in *Boston Harbor* would not attempt to achieve anything other than reducing construction costs. Anything more would constitute "regulation" by either a private or public proprietor. Unlike *Boston Harbor*, where the Court found "no basis on which to distinguish the incentives at work [there] from those that operate elsewhere in the construction industry," 507 U.S. 232, the incentives at work in Executive Order No. 13202 (competition, neutrality, expansion of job opportunities for small disadvantaged businesses and prevention of discrimination) do not operate elsewhere in the construction industry. Rather, such incentives appropriately form the basis of government regulation.

C. Accepting That Executive Order No. 13202 Is Regulatory, Then It Must Be Deemed Invalid Under *Garmon* and *Machinists* Preemption Principles.

As described in *Boston Harbor*, the Supreme Court has developed two sets of NLRA preemption principles. *Garmon* preemption prohibits regulation of activities that are arguably subject to §7 or §8 of the National Labor Relations Act. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). *Machinists* preemption prohibits government regulation of areas Congress intended to be left "unregulated and . . . controlled by the free play of economic forces." *Machinists Lodge 76 v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 144 (1976). The Court of Appeals failed to consider whether the Executive Order is preempted by the National Labor Relations Act under *Garmon* or *Machinists*, since it concluded that the Executive Order constitutes proprietary action rather than regulation. As argued above, this underlying conclusion was erroneus and, therefore, the preemption issue must be considered.

With respect to *Garmon* preemption, the District Court held:

> Executive Order No. 13202 does not violate the *Garmon* preemption rule with respect to federally-funded construction projects conducted by public entities. However, Executive Order No. 13202 does violate *Garmon* preemption with respect to federally-funded projects conducted by private employers.

Thus, the District Court concluded that Executive Order No. 13202 is invalid under *Garmon* preemption only insofar as it extends to private recipients of federal funding. The District Court, however, concluded that *Machinists* preemption has a broader effect, holding that Executive Order No. 13202 violates the *Machinists* preemption doctrine for both construction conducted by federal agencies *and* construction by recipients of federal funding.

1. Executive Order No. 13202 is Invalid Under *Garmon* Preemption Principles.

As noted above, the District Court concluded that the Executive Order is invalid under the *Garmon* preemption doctrine, but only to the extent it applies to recipients of federal funding. The District Court was correct in concluding that *Garmon* preemption invalidates the Executive Order as it applies to recipients of federal funding. However, the District Court erred by concluding that the Executive Order is valid under *Garmon* to the extent that public owner-developers are concerned.

a. The District Court correctly concluded that Executive Order No. 13202 is invalid insofar as it applies to private recipients of federal funding.

Section 8(f) of the NLRA, 29 U.S.C. §158(f), clearly protects the use of PLAs by private employers. Yet the Executive Order purports to prohibit private employers from exercising their rights under the NLRA to negotiate pre-hire collective bargaining agreements that apply to an entire construction project. Because the Executive Order infringes upon private employers' rights under §8(f) to use PLAs, *Garmon* preemption is unquestionably implicated.

b. The District Court erroneously concluded that Executive Order No. 13202 does not violate the *Garmon* preemption principle with respect to construction projects that are conducted by public entities.

According to the District Court, public entities are not "employers" covered by §8(f), and, therefore, the Executive Order is not implicated by *Garmon* preemption to the extent it prohibits PLAs on projects conducted by public entities. In reaching this conclusion, the District Court ignored the role of construction managers, and failed to recognize their right to determine what system of labor relations will work best for any given construction project. The Executive Order, by its express terms, prohibits construction managers — "employers" under §2(2) of the NLRA — from entering into PLAs on behalf of federal agencies and recipients of federal funding. It does not matter whether a private construction manager is acting on behalf of a private or public employer; in either case, the construction manager is an "employer" under the NLRA. *Management Training Corp.*, 317 NLRB 1355, 1358 (1995); *NLRB v. YWCA of St. Louis*, 192 F.3d 1111, 1117-18 (8th Cir. 1999); *Aramark Corp. v. NLRB*, 179 F.3d 872, 874-78 (10th Cir. 1999); *Pikeville United Methodist Hosp. v. United Steelworkers*, 109 F.3d 1146, 1151-52 (6th Cir. 1997); *Teledyne Econ. Dev. v. NLRB*, 108 F.3d 56, 59 (4th Cir. 1997). Insofar as Executive Order No. 13202 purports to prohibit private construction managers from entering into PLAs, it is preempted under the principles of *Garmon*. The Executive Order is invalid even as to public owner-developers because it unquestionably interferes with private construction managers' ability to exercise their right to use a PLA.

Lest there be any doubt, it is extremely significant to note that, in *Boston Harbor*, the private construction manager — Kaiser Engineers, Inc. — suggested the use of the PLA and negotiated its terms. 507 U.S. at 221. The Court characterized the MWRA's use of a PLA as promoting the legislative goals of §8(f). Yet, if Executive Order No. 13202 would have been in effect at the time of *Boston Harbor*, it would have prohibited Kaiser from pursuing its chosen system to manage labor relations on the project.

In short, a construction manager — a private employer under NLRA §2(2) — should not be deprived of its right under §8(f) to pursue a PLA, just because it happens to be managing a public project, rather than a private project. Public entities hire project managers in order to take advantage of their expertise. If the construction manager recommends — after surveying the project, looking at the crafts, and considering the phases of the project — that a PLA would be advantageous, it is foolish to say that the project manager's advice cannot be followed. This is particularly true since private owners can use PLAs. It makes no sense to prohibit federal agencies acting as market participants from taking advantage of a useful tool that is available to private owners, and such a restriction is preempted under *Garmon*.

2. Executive Order No. 13202 Is Invalid Under *Machinists* Preemption Principles, as the District Court properly found.

The District Court properly concluded that Executive Order No. 13202 is preempted by the NLRA under the *Machinists* doctrine, both as to recipients of federal funding *and* federal agencies. As noted by the District Court, *Machinists* preemption is implicated because Executive Order No. 13202

was intended to create an ideally balanced state of bargaining, according to the President's notion of open competition. Pursuant to *Machinists*, whether or not a PLA is negotiated and used must be left to the forces of the free market. The Executive Order, by prohibiting federal agencies and recipients of federal funding from using PLAs, collides head first with this principle.

As noted by the District Court, Executive Order No. 13202 has the effect of denying an *option* to public owner-developers that is available to private owner-developers. Insofar as the Executive Order operates to deny public owner-developers the ability to use PLAs, it is clearly regulating a decision that must be left to market forces. There can be no question that PLAs can benefit owner-developers. As discussed above, a PLA is the only way to establish uniform working hours, overtime policies, holidays, etc. And a PLA is the only way to ensure that no strikes will plague a lengthy construction project. Clearly, PLAs can be valuable tools for owner-developers. The Executive Order, insofar as it deprives public owner-developers the right to a benefit enjoyed by private owner-developers, must be deemed invalid.[5] The rule purports to be neutral with respect to PLAs, but clearly it is not.

To the extent that the Executive Order prohibits owner-developers and labor organizations from negotiating PLAs, it clearly disrupts the economic balance between management and labor. This prohibition violates the fundamental precept of *Machinists* preemption, insofar as it unquestionably constitutes "regulation of areas Congress intended to be left 'unregulated and . . . controlled by the free play of economic forces.'" *Reich*, 74 F.3d at 1334, *quoting from Machinists Lodge 76*, 427 U.S. at 144. "No state or federal official or government entity can alter

[5] Of course, the Executive Order's interference with free market forces is also felt by labor organizations who wish to negotiate PLAs.

the delicate balance of bargaining and economic power that the NLRA establishes, whatever his or its purpose may be." *Id.* at 1337. Quite simply, "*Machinists* preemption preserves Congress' intentional balance between the uncontrolled power of management and labor to further their respective interests." *Boston Harbor*, 507 U.S. at 226 (internal quotation marks omitted). Here, as noted by the District Court, the Executive Order interferes with the balance of economic and bargaining power established by the NLRA, and, for that reason, it is invalid under *Machinists* preemption.

CONCLUSION

Based upon the foregoing, the Court should grant Petitioners' Petition for a Writ of Certiorari.

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